Supreme Court of the United States

October Term, 1939

Original No.....

Ex Parte:

In the Matter of Wallace S. Bransford as County Treasurer of Pima County, Arizona, and ex-officio Tax Collector.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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BRIEF ON ORIGINAL APPLICATION OF PETITIONER FOR WRIT OF MANDAMUS

STATEMENT OF JURISDICTIONAL GROUNDS

This is a petition for a writ of mandamus directed to the Judge of the United States District Court for the District of Arizona, and said Court, that said Judge do call in two additional judges for the purpose of constituting the statutory court provided for by Section 266 of the Judicial Code, Title 28, U. S. C. A., Section 380.

The suit in question is one brought by the Valley National Bank of Phoenix, Arizona, a national banking association, against the members of the State Tax Commission and the State Board of Equalization of Arizona, and four counties of that State, together with the officials of those counties who are empowered to levy and collect taxes, to restrain the collection of state and county taxes for the year 1935 which plaintiff's

complaint alleges were unconstitutionally levied against the plaintiff and its shareholders. There is no claim of jurisdiction on the basis of diversity of citizenship. Upon the filing by the plaintiff of its Second Amended and Supplemental Bill of Complaint and its making an application seeking a temporary injunction against the collection of such taxes, the petitioner and other defendants requested the District Court and Judge to call in additional judges pursuant to the statute mentioned to hold the hearing. This request was denied, the District Judge ruling that it was not a three judge matter.

As will more definitely appear hereafter in the Statement of the Case, your petitioner, as County Treasurer of Pima County, Arizona, and ex-officio Tax Collector is and was as to 1935 taxes charged by law with the duty of collecting both the state and county taxes challenged by plaintiff.

The question raised is jurisdictional to such an extent that a court may, in a pending case, of its own motion, consider the question. That being true, the petitioner here is in a position to raise the question and it seemed unnecessary to have the other defendants join.

Should the petitioner's contention that the case mentioned is an appropriate one for a three judge court be sound, there would be no appeal either to the Circuit

Court of Appeals or to this Court from any judgment rendered by a single judge. In such circumstances the right to the writ of mandamus is recognized.

Section 234, Judicial Code,
Title 28, U. S. C. A., Section 342.
Stratton v. St. Louis S. W. Ry. Co.,
282 U. S. 10,
75 L. Ed. 135,
51 Sup. Ct. Rep. 8.

The importance of an early and full consideration of the question is emphasized by the recent decision holding that the action of this court on an application for a writ of mandamus concludes the question.

Everglades Drainage District v. Florida Ranch, etc., Corp., (C.C.A., Fla.)
74 F. (2d) 914.

STATEMENT OF THE CASE

Section 266 of the Judicial Code (Title 28, U. S. C. A., Section 380) provides, so far as is material to this petition, as follows:

"No interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a State by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative

board or commission acting under or pursuant to the statutes of such State, shall be issued or granted by any justice of the supreme court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the supreme court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the supreme court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of such three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the supreme court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges; provided, however, that one of such three judges shall be a justice of the supreme court or a circuit judge."

The State of Arizona raises revenue to defray the expense of the state and county governments by, in addition to other methods, taxes levied upon real and tangible personal property. At the head of the system is the State Tax Commission, the members of which also constitute the State Board of Equalization. This Board has supervisory power and control over the county taxing officials in the matter of valuations and it also fixes the rate deemed necessary for the collection of revenues for state purposes. In the counties, the

County Assessor makes the original valuation of real and tangible personal property (with exceptions not necessary here to be noted) upon which levies for state and county taxes are laid, and the statutes give the taxpayer an appeal to the County Board of Supervisors which is also the County Board of Equalization. As its name indicates, it has the power to equalize taxes and control valuations subject to revision by the State Board. When taxes finally come to be fixed, the County Board determines the rate to be charged for county revenues and adds thereto the state rate fixed by the State Board. The tax roll is ultimately made and sent by the County Board to the County Treasurer who proceeds to the collection of both the state and county taxes, having power of distraint for that purpose. The property of corporations generally is taxed as above stated but in the case of banking corporations, national and state, the method of taxation is special in the particular that the shares of stock in, rather than the property of the corporation, are the subject matter of the levy. In other particulars, including valuation, reviews by the county boards and the State Board of Equalization, the levy for state and county purposes and the collection by the County Treasurer and ex-officio Tax Collector of both state and county taxes, the method is the same. The applicable statutes governing the taxation of shares of stock of banking corporations appear in the 1928 Code, amended as indicated, as follows:

"Section 3069. Assessment of property and shares of stock in corporations; banking, building and loan associations or corporations, and finance corporations. The property of corporations shall be assessed and taxed and no assessment shall be made of the shares of stock of corporations, nor shall any holder thereof be taxed for such shares. The foregoing provision shall not apply to a banking corporation, building and loan associations or corporations, and a corporation or association engaged in the business of using money wherewith to make money for the owners of its shares, the shares of stock of which shall be assessed and taxed as other property, in the name of the shareholders of the several shares thereof, to be entered and taxed in the name of, and be payable by, such corporation or association." As amended by the Session Laws of 1931, Chapter 110, Section 1.

"Section 3070. Statement to assessor by banking corporation and shareholders; tax payable by corporation. Upon the demand of the assessor, the officers in charge of any such banking corporation or such corporation or association engaged in the business of using money wherewith to make money, shall make out and deliver to said assessor a sworn statement showing the number of shares, the name and residence of each shareholder, and the number of shares owned by him; the surplus, reserve fund, and undivided profits; and the par and marked value of the shares. The full cash value of such shares shall be ascertained according to the best information which the assessor may be able to obtain, whether from any return made

to any officer of the state or the United States, from actual sales of the stock, or from other trustworthy sources. Every such shareholder shall, where such corporation or association is located, render at their full cash value to the assessor all shares owned by him therein, and if the shareholder fail to do so, the assessor shall list and assess such unrendered shares as other unrendered property. The taxes due thereon shall be paid by such corporation or association, and shall be a lien against and assessed to such shares of stock, and no such corporation or association shall pay any dividends to any shareholder who is in default in the payment of taxes due on his shares, nor shall it permit the transfer on its books of any shares the owner of which is in default in the payment of his taxes on the same."

"Section 3071. Situs of stock; where tax payable. Every such corporation or association, for the purpose of said assessment, shall be considered as located in every county, city or town wherein it has an office for the purpose of carrying on its business, and the shares shall be subject to taxation in any county, city or town wherein it has such office. The officer of such corporation or association shall state in his statement if his association or corporation is subject to taxation in more than one county, city or town, and the proportion of its assets situated in each thereof. The shares of such corporation or association shall be taxed in each county, city or town for only such portion of their value as the assets situated in that county, city or town bear to the assets of the entire

corporation or association. *When a bank maintains branches or conducts business in more than one county, city or town, the assessed value of the capital stock shall be apportioned among the several counties, cities and towns in which the main office or such branches are maintained or business conducted, and the amount apportioned to each county, city or town shall not be less than the actual cash value of the real and personal property of such bank situated in such county, city or town.*"

(Petitioner's Italics)

It will be noted from the Second Amended and Supplemental Complaint (an exhibit to the petition) that the plaintiff did maintain a branch or branches in each of the four counties made parties defendant. It is there alleged: that the bank in each of said counties made and delivered to the County Assessor the sworn statement required by the statute (Paragraph VII. See pages 22, 23 of the petition filed); that the Assessor for Maricopa County in his valuations erroneously included the sum of $1,200,000.00 "being the par value of the preferred stock of plaintiff issued to and owned and held by the Reconstruction Finance Corporation" (Paragraph XII, pages 26, 27); that in the County of Mohave the County Assessor erred in that he did not deduct from an otherwise proper calculation 25% thereof as previously directed by the State Tax Commission (Paragraph XIX, page 41); that the Assessor of the County of Pima erroneously valued the stock of theplaintiff apportionable to his county at an amount

equal to the value of the real and tangible personal property therein and that a similar error was committed by the Assessor of Graham County. (Paragraphs XIII, XVI and XVII; pages 28, 32 and 34.)

Allegations are made to the effect that the plaintiff did protest against the valuations fixed by the Assessors in the several counties to the County Boards of Equalization, and, being denied relief there, did subsequently unsuccessfully protest to the State Board of Equalization against such valuations, the result being that in each instance the original valuations were extended to the taxation rolls for the collection of both state and county taxes by the respective County Treasurers. (Paragraph XXII, page 43.)

The ground on which the plaintiff claims that the alleged excessive taxation of its stock in Maricopa County is void is that to the extent of such excess it constituted a taxation of its preferred stock while in the hands of the Reconstruction Finance Corporation, alleged to be exempt from state taxation by virtue of the retroactive feature of the Act of Congress of March 20, 1936, Chapter 160, Title 12, U. S. C. A., 51-D, an enactment passed after the taxes in this case were levied and subsequent to the filing of the original complaint. (Paragraph XXXIX, page 68.)

The alleged overvaluation made by the Mohave County Assessor, and confirmed by the several reviewing boards, is attacked on the basis of discrimination

against the plaintiff and in favor of other property owners.

While the four counties and their taxing officials are joined in this suit, whether appropriately or not, there are really four independent claims made, identical so far as Pima and Graham Counties are concerned, but otherwise variant. Whether the suit as to the County Treasurers and ex-officio Tax Collectors of Maricopa and Mohave is such as to require the calling of two additional judges or not, it is submitted that so far as the application for a temporary injunction against the County Treasurer of Pima County and ex-officio Tax Collector, your petitioner herein, is concerned, the case falls within the terms of the section in question.

The complaint alleges that the valuation in Pima County (and Graham County) is void, notwithstanding it appears to have been in strict conformity with the last sentence of Section 3071 of the Arizona Code, on a number of grounds, some of which at least attack the constitutionality of the statute. The complaint emphasizes the fact that the taxing officials of Pima County in fixing the taxes for 1935 and after years, did take and continue to take the position that they have the right to place the valuation of the stock in the plaintiff at an amount not less than the actual value of the real and personal property of the bank situated in such counties—that is, follow the mandatory requirement of Section 3071. (Paragraph XXXIV, page 64.)

The reasons given, summarized, why such method

is void, are found in paragraph XVIII. It is averred that, if the assessments in Pima and Graham Counties are to be construed as assessments and valuations of the property owned by the bank, as distinguished from the shares of stock in the bank, such assessments are void for the reason that the statutes of Arizona, as construed by the Supreme Court of Arizona, provide for the taxation of the shares of stock only. This, of course, raises no federal question.

Nor may the pleader reasonably claim that such assessments could possibly be considered as an effort to tax the real and tangible personal property of the bank in Pima County. As we have already shown, the complaint alleges that the bank filed the lists of its stockholders as required by the statute, and additional allegations are in the complaint to the effect that the taxes in question are a lien on the property of the common stockholders. (Paragraph XXX, page 52.)

Next, in Paragraph XVIII, it is said that the taxes levied by these two counties are void if they are to be construed as assessed against the common and preferred stock of the bank, inasmuch as there is no segregation of the taxes as between the two classes of stock and none is possible.

We think there is nothing in the allegations of fact in the bill to justify pleading on the assumption of the possible construction of the taxes in these two counties as declared levies on the preferred stock of the bank.

The paragraph in question (Number XVIII) then proceeds to the real nub of the suit and avers that if the taxes levied in the two counties mentioned are construed as assessments on the common stock of the bank, and that is truly what they are, then they are void for five numbered reasons: (Pages 38-40.)

1. In so far as the valuation fixed exceeds what the plaintiff claims is the correct amount, it is alleged to be a tax upon the exempt preferred stock of the bank;

2. The valuation is excessive;

3. The valuation in said two counties of the stock in the plaintiff are twice those in the case of banks which have issued no preferred stock and are consequently discriminatory;

4. The valuations are discriminatory in that they are greater than those fixed for other classes of property; and,

5. The valuations in said two counties are in violation of Title 12, U. S. C. A., Section 548, in that they are greater than like taxes on other moneyed capital in the hands of individual citizens of Arizona.

These are attacks on the "valuations" on the basis of the due process and equal protection clauses of the 14th Amendment and Acts of Congress.

The prayer (1) is that the court decree the assessments made in the various counties as in violation of the Constitution and Laws of the United States and the Constitution and Laws of the State of Arizona; and

(7), that a temporary and interlocutory injunction issue against the defendants restraining them from the collection of the said taxes and that it be made permanent on final hearing.

ARGUMENT

It is submitted that every element essential to the creation of the statutory court under Section 266 of the Judicial Code is present.

There is an application for an interlocutory injunction to a district judge and court. It is being pressed for consideration.

The action of an *officer of the State* of Arizona is sought to be restrained. This is true even if we disregard the defendants who are members of the State Board of Equalization as unnecessary parties. County Treasurers are ex-officio tax collectors of state taxes as well as county taxes and, so far as taxes of the kind here involved are concerned, are the only tax collectors. This appears from the allegations of the pleading. (Paragraphs XXIV, XXV, et seq, pages 44, 45.)

Sections 3110 and 3111 of the 1928 Revised Code of Arizona provide:

"Section 3110.

The county treasurer shall be ex officio tax collector. * * *"

"Section 3111.

The county treasurer as tax collector shall col-

lect all state and county taxes and apportion the same to the several funds at the end of each month. * * * "

See: Spielman Motor Sales Co. v. Dodge,
295 U. S. 89,
79 L. Ed. 1322,
55 Sup. Ct. Rep. 678.

The case of Ex Parte Collins,
277 U. S. 565,
72 L. Ed. 990,
48 Sup. Ct. Rep. 585,

is distinguishable because there the assessment the collection of which was sought to be enjoined was for the purpose of raising revenues in which the state had no interest.

An interlocutory injunction is sought to restrain the *enforcement, operation or execution of Sections 3070 and 3071*, particularly the last sentence of Section 3071. This sentence requires that the value of the bank stock shall be apportioned to the several counties where it maintains branches and "shall not be less than the cash value of the real and personal property of such bank situated in such county." As pointed out above, the pleading alleges that the taxing officials in fixing the valuations in Pima and Graham Counties for the year 1935 took the position, and intend to continue so to do, that they have the right to fix the valuation as indicated in the language quoted. (Paragraph XXXIV, page 64.)

An injunction against the collection of the taxes so assessed in Pima and Graham Counties will prevent the statute from operating. The language of the statute is mandatory and the taxing officials may not value the property in a sum less than that determinable by the prescribed test. Should the court uphold plaintiff's contention and fix valuations of the stock as plaintiff claims they should be, the statute would certainly appear to be suspended. The effect of an injunction will be to direct this petitioner to disobey a statute he has sworn to uphold. The plaintiff is not asking for a three judge court and could not be expected to draft its bill so as to make all the elements necessary to a court of that character unmistakably clear. But it is submitted that the conclusion is inescapable that the purpose of the application is to bring about the suspension and restraining of the enforcement, operation and execution of the Arizona statute.

The three judge statute has been held applicable to a variety of state statutes and orders of state administrative boards and commissions. If the statute is properly applicable to cases involving statutes fixing rates,

Stratton v. St. Louis S. W. Ry. Co.,
282 U. S. 10,
75 L. Ed. 135,
51 Sup. Ct. Rep. 8,
Oklahoma Natural Gas Co. v. Russell,
261 U. S. 290,
67 L. Ed. 659,
42 Sup. Ct. Rep. 353,

prescribing crimes,

Spielman Motor Sales Co. v. Dodge,
295 U. S. 89,
79 L. Ed. 1322,
55 Sup. Ct. Rep. 678,

or undertaking to protect citizens in their employment,

Raich v. Truax,
219 Fed. 273,
Affirmed ,239 U. S. 233,
60 L. Ed. 131,
36 Sup. Ct. Rep. 7,

it would seem clear that it is likewise applicable where a temporary injunction is sought against the exercise by the state of the very high power of taxation.

> "It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible."

Boise Artesian Hot & Cold Water Co. v. Boise City,
213 U. S. 276,
53 L. Ed. 796,
29 Sup. Ct. Rep. 426.
Chicago Great Western Ry. Co. v. Kendall, infra.

And it has been applied to tax cases:

Chicago Great Western Ry. Co. v. Kendall,

266 U. S. 94,
69 L. Ed. 183,
45 Sup. Ct. Rep. 55;
Rast v. Van Deman Co.
240 U. S. 342
60 L. Ed. 679
36 Sup. Ct. Rep. 379;
Norfolk & Western R. Co. v.
Board of Public Works,
3 Fed. Supp. (3 Judge case) 791;
See, generally,
annotation 78 L. Ed. 1092,

We think this case is distinguishable from
Ex Parte Williams,
277 U. S. 267,
72 L. Ed. 877,
48 Sup. Ct. Rep. 523,

where the complaint of the taxpayer was that the taxing authorities had systematically and intentionally discriminated against it. No statute of the state was directly or indirectly attacked as unconstitutional and the action of the taxing officials in fixing the assessment was held not to be an "order" within the meaning of Section 266. Whether this case is entirely consistent with others by this court, see particularly Oklahoma Natural Gas Co. v. Russell, supra, may be open to question, but it would not appear to be controlling where, as here, the assessment was made pursuant to and in an amount required by the express and mandatory language of a state statute, and the petitioner as

state tax collector was about to proceed to enforce the statute by collecting the resulting tax.

Section 266 has the double purpose of providing for a hearing before a court equipped to give the matters involved more adequate consideration than might be expected from a single judge and for an appeal directly to the United States Supreme Court so as to minimize delay. Cases involving the collection of state taxes would certainly seem to be within the intendment of the statute as defined by the court in Stratton v. St. Louis S. W. Ry. Co., supra. No interference with the exercise of state power could be "graver" than an injunction against the collection of taxes needed to carry on the state government.

If the plaintiff in this case, desiring a three judge court, had challenged the valuations for the collection of state and county taxes established pursuant to the last sentence of Section 3071 in Pima and Graham Counties on the ground that the statute under which the officers acted was unconstitutional, there would, we think, be no serious question of the applicability of Section 266 of the Judicial Code. No such directness of expression appears in the pleading before this Court but we submit that it makes that attack. The right of the defendants to have a three-judge court ought not to depend upon the plaintiff's choice of phraseology.

The complaint is not susceptible of the interpretation that the statute is valid but that the officials, under its guise, have systematically and intentionally discriminated against the plaintiff. It may be that under

Ex Parte Williams, supra, there is basis for denying the application of Section 266 in such a situation. Be that as it may, we have a case here where the state statute and the valuation fixed in Pima and Graham Counties for collection of state and county taxes are identical in scope. If the "valuation" or assessment, call it what you may, is void, and taxes may not be collected thereon, it is only because the statute is void. One cannot be valid and the other invalid.

If the statute does not apply here, it would seem that it may never apply in cases involving the collection of taxes on the basis of ownership of property.

Attention is called to the fact that the members of the State Tax Commission and the State Board of Equalization are parties defendant and that the plaintiff requests an injunction against them. These officials are clearly state officials although the actual collection of state, as well as county, taxes is in the hands of the County Treasurers. Should the plaintiff's contentions that the taxes are void be upheld, some different apportionment among the counties than that approved and directed by such defendants will have to be ordered. The Court is surely not bound to accept the apportionment that the plaintiff submits in its pleading, and we question whether the federal court can sit as an equalization board. Perhaps they are joined as defendants so that it may be decreed that they convene, reverse themselves, and establish valuations in accordance with the court's views. If so, this would

seem to be an additional reason for requiring a three-judge court.

It is respectfully submitted that a rule to show cause should be issued and that upon final hearing the necessary writ of mandamus should be granted.

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